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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CARLOS GONZALEZ, Defendant and Appellant.	C068331 (Super. Ct. No. 10F01242)

Defendant Carlos Gonzalez pleaded no contest to felony evasion of a pursuing police officer and misdemeanor driving on a suspended license (Veh. Code, §§ 2800.2, subd. (a), 14601.2, subd. (a)), and admitted he had a prior strike conviction and had served a prior prison term (Pen. Code, §§ 667, subds. (b)-(i), 667.5, subd. (b), 1170.12).[1] In accordance with the plea agreement, defendant was sentenced to five years in state prison. On appeal, he contends the trial court (1) coerced his plea and (2) violated

[1] Undesignated statutory references are to the Penal Code.

section 1204.5 by reviewing, prior to defendant's change of plea, the preliminary hearing transcripts and the People's motion in limine, which contained information regarding his prior criminal history. We affirm.

BACKGROUND

On February 21, 2010, Sacramento police officers saw a car speeding and noticed it did not have license plates. The officers initiated a traffic stop, but instead of stopping, the driver of the car (later identified as defendant) continued traveling at a high rate of speed and ran several stop signs. The car eventually stopped on a residential lawn, and defendant fled on foot until he was apprehended by the officers.

A criminal complaint was filed on February 23, 2010. Public Defender Graves represented defendant from arraignment through March 25, 2010, when defendant entered not guilty pleas and denials and the preliminary hearing was set. During this time, defendant rejected a settlement offer from the prosecution for a 32-month prison term. Public Defender Hallinan represented defendant thereafter.

The preliminary hearing was held on April 7, 2010. Defendant was held to answer. On June 15, 2010, defendant was granted in propria persona (pro. per.) status.

The information was amended on June 18, 2010, alleging: count one, felony evasion of a pursuing police officer (Veh. Code, § 2800.2, subd. (a)); count two, unlawful felony possession of a dagger or dirk (Pen. Code, § 12020, subd. (a)); count three, misdemeanor driving on a suspended license (Veh. Code, § 14601.2, subd. (a)); a prior strike conviction for causing corporal injury to a spouse with great bodily injury (Pen. Code, §§ 273.5, 667, subds. (b)-(i), 1170.12, 12022.7); and a prior prison term (Pen. Code, § 667.5, subd. (b)). Defendant waived formal arraignment, entered not guilty pleas to the charges, and denied the special allegations. Thereafter, on August 6, 2010, the trial court dismissed count two upon the prosecutor's motion.

On October 15, 2010, defendant requested that the trial court revoke his in pro. per. status and reappoint counsel. The trial court reappointed the public defender's office

and Attorney Hallinan resumed representation of defendant. A few days later, defendant appeared and said he wanted to "continue" his in pro. per. status. The trial court denied the request, stating it would not "play that game anymore."

On December 3, 2010, after Attorney Hallinan requested the court declare doubt as to defendant's competence, criminal proceedings were suspended and an evaluation ordered. Defendant was found competent on February 8, 2011, and criminal proceedings were reinstated.

On February 10, 2011, defendant requested in pro. per. status because Attorney Hallinan was representing him again. After further inquiry regarding defendant's desires, the trial court put the matter over for a week to allow defendant time to consider whether he wished to bring a *Faretta* motion to proceed in pro. per. or a *Marsden* motion.[2]

On February 25, 2011, the trial court granted defendant's request for a *Marsden* hearing. During the hearing, defendant complained, inter alia, that the prosecution's offer had gone from 32 months (before the preliminary hearing) to five years. He also wanted Attorney Hallinan to bring a pretrial *Romero* motion to dismiss the strike conviction.[3] Defendant's *Marsden* motion was denied.

After defendant's *Marsden* motion was denied, the matter was put over for a few days for defendant to consider whether he wanted to proceed in pro. per. again. Defendant was warned that any *Faretta* motion should be made within the week, and he was not to wait until trial and then seek a continuance.

On March 4, 2011, defendant made a *Faretta* motion, requesting he be permitted to proceed in pro. per. and seeking a continuance of the trial date. The trial court initially granted his request but was then informed of defendant's previous vacillation between

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[2] *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562] (*Faretta*); *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

[3] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

represented and in pro. per. status. The trial court then warned defendant that, should he be granted in pro. per. status again, he would not likely be appointed counsel again if he should change his mind. Upon further discussion regarding defendant's dissatisfaction with Attorney Hallinan, the trial court found defendant's request to represent himself was not unequivocal and withdrew its previous grant of in pro. per. status.

On April 25, 2011, the date set for jury trial, defendant entered a conditional plea of no contest to a misdemeanor charge in count three -- conditioned on a guilty verdict on count one. The trial court also heard motions in limine, including a motion by the prosecution to admit certain prior convictions should defendant choose to testify and defendant's motion to bifurcate the prior conviction allegations, both of which were granted.

At the conclusion of that hearing, defendant asked the court, "If I was to write a letter to you tomorrow morning before I get sentenced will you give me consideration if I give up my rights and plead guilty and sentence me yourself 1385 or --." The current offer from the prosecution was for five years. Defendant was proposing 44 months. Defendant's exposure was seven years in state prison. The trial court told defendant it would consider such a communication as long as defendant's attorney knew what it was and it was appropriate.

The following day commenced with defendant again requesting he be permitted to proceed in pro. per. He stated that he had been under the impression when he asked for counsel to be reappointed that he would be represented by someone else and was dissatisfied with being represented by Attorney Hallinan. The trial court advised defendant of the risks of proceeding in pro. per. In this regard, the trial court explained that self-representation is unwise, that it had reviewed the preliminary hearing transcripts and considered a guilty verdict nearly assured, that defendant would be opposing a trained prosecutor and would not be given special treatment, and that defendant's exposure was seven years. The trial court then stated it would give defendant 15 minutes

to think about it. Defendant responded by asking the trial court to read a letter he had written.

The letter sought leniency and requested the trial court give defendant an intended sentence to help him decide whether he should accept the settlement offer. Pursuant to this request, the trial court (after noting that it had seen the alleged prior convictions in the People's motion in limine and had considered how reckless defendant appeared to have been based on the preliminary hearing transcript) indicated it would impose seven years.

At this point, defendant asked if the five-year offer was still open. The trial court confirmed that it was and defendant took it. The trial court and parties then spent time coordinating a date for the sentencing hearing because defendant did not waive his right to be sentenced by the same judge and the judge was visiting from another county.

On May 17, 2011, the date set for sentencing, defendant refused to leave his cell. That afternoon, he appeared and made another *Marsden* motion. His main complaint was that Attorney Hallinan would not file a pretrial *Romero* motion. Defendant's comments at the *Marsden* hearing reveal that what defendant wanted was to know if the trial court was going to dismiss his prior strike so he could know with certainty whether the prosecution's plea offer was the better deal. He also asked the trial court to watch the police officer's dashboard camera video to see if the trial court thought he was reckless,[4] consider his criminal history, and then indicate whether it would be willing to dismiss his prior strike if he went to trial and brought a posttrial *Romero* motion.

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[4] Even though both Attorney Hallinan and the trial court informed defendant that he could be found to have been driving recklessly (per se) by virtue of the fact that he broke more than three traffic laws, defendant continued to focus solely on his perception that the general quality of his driving was not erratic or "reckless" (i.e., he was not turning corners at extremely excessive speeds and did not lose control of the vehicle). Attorney Hallinan also stated that the video shows defendant violated more than three traffic laws during the pursuit.

The trial court refused to watch the video or provide an intended ruling on a theoretical *Romero* motion (although it did restate that, based on what it knew, defendant would likely be sentenced to seven years in the absence of the plea agreement). The trial court then denied the *Marsden* motion and sentenced defendant to five years in state prison in accordance with the plea agreement.

I

VOLUNTARINESS OF PLEA

In his certificate of probable cause, defendant challenged the validity of his plea, claiming the alleged ineffective assistance of his counsel had factored into his decision to enter into the plea agreement. On appeal, he claims it was judicial coercion that caused him to enter into the plea agreement.

Defendant has forfeited his claim on appeal because he never made a motion to withdraw his plea in the trial court. As a general rule, "an appellate court will not consider claims of error that could have been—but were not—raised in the trial court. [Citation]." (*People v. Vera* (1997) 15 Cal.4th 269, 275.) Section 1018 expressly allows a defendant to move to withdraw a plea "at any time before judgment." Nothing in the record suggests defendant was unaware of the alleged circumstances supposedly resulting in his involuntary plea before judgment was entered several weeks later. Accordingly, his claim is forfeited. (*People v. Turner* (2002) 96 Cal.App.4th 1409, 1412-1413.)

In any event, his claim fails on its merits. Defendant complains of comments made by the judge that a guilty verdict was a " 'dead bang' " and that "it would appear to me that unless there is some total miracle, I couldn't conceive where or how it would happen, the jury is going to return a verdict of guilty of [*sic*] on both of those matters, at least about the evading a pursuing peace officer. And you're looking at seven years in state prison."

But unlike the cases cited by defendant in support of his claim of error, which discuss the limitations and problems inherent in a judge's involvement in plea

negotiations, the judge's remarks here were not made during plea negotiations or a discussion of the People's offer. The remarks were made the day after defendant had indicated he was not inclined to take the offer and was proceeding to trial[5] -- and they were made in direct response to defendant's request to proceed in pro. per.

To assure a valid waiver of the right to counsel, a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' [Citation.]" (*Faretta, supra,* 422 U.S. at p. 835 [45 L.Ed.2d at p. 582].) The record must demonstrate that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070.)

The judge here was not inserting himself into the plea negotiations but, rather, fulfilling his obligation to provide an adequate *Faretta* warning.

We also note that before continuing with the recommended advisements (see *People v. Lopez* (1977) 71 Cal.App.3d 568, 572-574), the judge followed the complained-of remarks with the following statement: "But you're entitled to represent yourself. You are entitled to have a fair and just trial. [¶] And if you go to trial, we are going to go to trial today, and I'm going to do my very level best based upon my background, experience and training to see to it that you have a very fair trial in all respects. But it is kind of discouraging to me to see a person playing Roulette with five loaded rounds and obviously one empty chamber."[6] This statement certainly diminished

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[5] The offer was to remain open until the following morning, when jury selection commenced.

[6] Defendant's trial counsel subsequently stated he, too, had told defendant from the beginning that he would continue to fight as hard as he could, but at the same time, the facts of the case did not leave him with much to work with and he thought defendant would be found guilty.

any potential perception that the trial court would not provide him with a fair trial if he continued to reject the People's offer.

Defendant also alleges that his plea was coerced because the trial court had indicated a sentence, *at his request*. In doing so, the court said that it would be inclined to sentence him to the upper term of seven years in the absence of a plea agreement and that it "certainly" understood why no less than a five-year offer had been made. Defendant portrays this as improper inducement by expressly informing him that he would be punished more harshly if he chose to exercise his constitutional right to trial. This allegation of coercion is baseless. This is the nature of plea bargains -- the prosecution is relieved of its burden of proving guilt, and in return, the criminal defendant is allowed to plead to a lesser offense or to receive a shorter sentence. There is nothing improper about a judge approving a plea agreement that provides for a sentence less than what a defendant might otherwise receive. And defendant most certainly cannot complain that the judge provided him with an indicated sentence, since he expressly asked for one.

II

SECTION 1204.5

Section 1204.5 provides, in pertinent part: "(a) In any criminal action, after the filing of any complaint or other accusatory pleading and before a plea, finding, or verdict of guilty, no judge shall read or consider any written report of any law enforcement officer or witness to any offense, any information reflecting the arrest or conviction record of a defendant, or any affidavit or representation of any kind, verbal or written, without the defendant's consent given in open court, except as provided in the rules of evidence applicable at the trial, or as provided in affidavits in connection with the issuance of a warrant or the hearing of any law and motion matter, or in any application for an order fixing or changing bail, or a petition for a writ." Under subdivision (b) of section 1204.5, however, a judge who is not the preliminary hearing or trial judge in the

case is not precluded from considering information about the defendant for the purpose of adopting a pretrial sentencing position or approving or disapproving a guilty plea entered pursuant to section 1192.5, as long as the defendant has (or waived) counsel and the information was provided to all parties in advance so as to permit supplementation or rebuttal.

"Section 1204.5 was enacted in 1968 (Stats. 1968, ch. 1362, § 1, p. 2599) in response to the concerns of some that many courts were then requiring prosecutors to file police reports and criminal records information together with criminal complaints, and that this information could improperly influence judges in their rulings prior to or during trial to the prejudice of a defendant. (*O'Neal v. Superior Court* (1986) 185 Cal.App.3d 1086, 1091 [(*O'Neal*)].) The bill was eventually sponsored by the State Bar, and when passed included well-defined exceptions to the prohibition on use of the specified information. (*O'Neal[], supra*, 185 Cal.App.3d at pp. 1092-1093.) Section 1204.5 has never been amended and only rarely discussed in appellate decisions." (*Breedlove v. Municipal Court* (1994) 27 Cal.App.4th 60, 63-64.)

Defendant contends the trial court violated section 1204.5 by reviewing the preliminary hearing transcript and the People's motion in limine, which contained information regarding his prior criminal history, prior to his change in plea.

The contention fails for multiple reasons, the most cogent of which is that the documents reviewed by the court do not fall within the proscriptions of section 1204.5.

A. Preliminary Hearing Transcripts

Preliminary hearing transcripts do not fall within the plain language of section 1204.5's prohibition. Preliminary hearing transcripts may include the testimony of law enforcement officers or witnesses, but contrary to defendant's blanket assertion, they are *not* "written report[s] of any law enforcement officer or witness to any offense" as provided for in section 1204.5.

It is not unusual for a trial judge to review the preliminary hearing transcripts prior to trial and it is not prohibited. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 16.) In fact, it is not prohibited for the same judge to preside over both the preliminary hearing and the trial, or for the judge who presided over a trial to preside over a retrial on remand. (*Id*. at pp. 15-16.)

There was nothing improper in the trial court's review of the preliminary hearing transcripts prior to trial.

B. Prior Criminal History in Motion in Limine

Defendant also contends the trial court's review of his prior criminal history, in connection with the People's motion in limine to admit evidence of certain prior convictions for impeachment purposes should defendant testify at trial, was in violation of section 1204.5.

However, Evidence Code section 788 authorizes the use of a prior felony conviction to attack the credibility of a witness, including the defendant, should he choose to testify. Misdemeanor convictions are also admissible to impeach a defendant where the conduct involved moral turpitude. (*People v. Wheeler* (1992) 4 Cal.4th 284, 292-294 (*Wheeler*).) Indeed, "[California Constitution, article I,] section 28[, former subdivision](d) [(now § 28, subd. (f)(2))] makes immoral conduct admissible for impeachment whether or not it produced any conviction, felony or misdemeanor." (*Wheeler*, at p. 297, fn. 7.)

Such evidence is admitted in the trial court's discretion, upon consideration of relevant factors. (See *People v. Beagle* (1972) 6 Cal.3d 441, 453-454; *Wheeler, supra,* 4 Cal.4th at pp. 296-297.) Evidence Code sections 310 and 402 provide for the trial court's determination of the admissibility of such proffered evidence outside the presence of the jury.

In accordance with these well-established principles, the trial court here considered the admissibility of defendant's prior criminal convictions in limine on the

first day of trial. The People's motion included a list of defendant's felony and misdemeanor convictions, as well as his parole violations and a notation regarding a 2008 arrest. Thus, although defendant now complains the trial court reviewed his criminal record prior to his plea, the trial court's review of his criminal record was performed "as provided in the rules of evidence applicable at the trial" and was, accordingly, expressly excepted from the prohibition in section 1204.5.

The trial court's in limine determination of the admissibility of defendant's prior criminal history for impeachment is, of course, in harmony with the policies underlying section 1204.5. The statute was not intended to prohibit consideration of defendant's criminal history or arrest records when relevant for a proper pretrial issue. (See *O'Neal*, *supra*, 185 Cal.App.3d at pp. 1092-1093.) Indeed, the legislative history underlying section 1204.5 includes a statement by the statute's original proponents, the Santa Monica Bay District Bar Association, that " '[p]rior to the conviction of the accused, the trial court should have no interest in his prior record, *except as it may be admitted in evidence during the course of the trial.' "* (*O'Neal*, *supra*, 185 Cal.App.3d at pp. 1091-1092, quoting statement of reasons from Bar Assn. resolution, italics added; see also 43 Cal.State Bar J. (1968) 498.)

We conclude that the trial court's consideration of defendant's criminal history, in a properly brought motion in limine to permit evidence of defendant's prior criminal history, does not violate section 1204.5.

We note that defendant could not prevail even if the trial court's actions violated the statute. The remedy, if the trial judge had reviewed information covered in section 1204.5, would have been disqualification of that judge from presiding over the remainder of the trial. (See *O'Neal*, *supra*, 185 Cal.App.3d at pp. 1093-1095.) Defendant, having failed to assert a timely objection, prevented the judge from disqualifying himself and thereby forfeited any objection he may have had to the trial court's review of the documents. (*People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 38;

see also *People v. Scott* (1997) 15 Cal.4th 1188, 1207 [party seeking judicial disqualification must so move at earliest practicable opportunity after discovery of foundational facts].)

Finally, given the ultimate resolution of this by a negotiated plea with a stipulated sentence, imposed by the same judge at defendant's request, there is no probability that the outcome would have been more favorable if the trial judge had disqualified himself from further trial proceedings after considering the complained-of information.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

NICHOLSON, J.

DUARTE, J.